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SUPREME COURT. U. S.

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FILED
OCT 16 1965
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1965

No. 676

NORTHWESTERN PACIFIC RAILROAD COMPANY,

Appellant,

vs.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA,

Appellee.

On Appeal From the Supreme Court of the State of California.

JURISDICTIONAL STATEMENT.

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IN THE

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No. .....

NORTHWESTERN PACIFIC RAILROAD COMPANY,
Appellant,

vs.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA,
Appellee.

On Appeal From the Supreme Court of the State of California.

JURISDICTIONAL STATEMENT.

Appellant, Northwestern Pacific Railroad Company, appeals from the judgment of the Supreme Court of the State of California, entered April 21, 1965, denying a Petition for Writ of Review from an order of the Public Utilities Commission of the State of California[1] dated September 22, 1964, requiring appellant to reconstruct its Puerto Suello Tunnel in Marin County, California. Appellant submits this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial questions are presented.

[1]The Public Utilities Commission of the State of California is hereafter referred to as California Commission.

Opinion Below.

The Supreme Court of the State of California rendered no opinion and its orders are unreported. Its Order denying a petition for Writ of Review is attached hereto as Appendix A. Its Order denying a Petition for Rehearing is attached hereto as Appendix B.

The Opinion and Order of the California Commission is reported at 63 Cal. P.U.C. 368 (1964), a copy of which is attached hereto as Appendix C. The Order Amending Decision and Denying Rehearing of the California Commission is reported at 63 Cal. P.U.C. 465 (1964), a copy of which is attached hereto as Appendix D. The Supplemental Order of the California Commission which is not yet reported is attached hereto as Appendix E.

Jurisdiction.

This action was an investigation instituted by appellee California Commission on its own motion pursuant to Secs. 310, 761 and 762 of the Public Utilities Code of California (California Stat. 1951 Chap. 764, pp. 2035 and 2052) to determine if appellant had any plans or intent to reconstruct its Puerto Suello tunnel and restore rail service as it existed prior to a fire that destroyed the tunnel in 1961 and to determine if appellant should be ordered to do so.

The order of appellee California Commission was entered September 22, 1964.

The California Commission found the appellant would delay rebuilding its tunnel in the absence of an affirmative order to reconstruct the tunnel, and that the order of the California Commission was to supplement an

earlier order of Interstate Commerce Commission denying authority to abandon the tunnel, with appellee's own affirmative order. The California Commission refused to consider substantially changed conditions and disregarded a pending application before the Interstate Commerce Commission based on substantially changed condition to abandon the same tunnel. The appellee proceeded in disregard of the provisions of the Interstate Commerce Commission Act (Sec. 1(18-20)) wherein the Interstate Commerce Commission has been given the exclusive jurisdiction over authorizing railroad abandonments, and the District Court has been given sole, complete and affirmative jurisdiction over unauthorized abandonments, including indefinite suspensions of service, as here.

A Petition for Rehearing was denied by appellee's Order Amending Decision and Denying Rehearing entered October 13, 1964.

The appellant thereupon filed in the Supreme Court of the State of California a Petition for Writ of Review pursuant to the authority of the state statute (Sec. 1756 and 1757 Public Utilities Code, Calif. Stats. 1963, c. 461, p. 1310, Sec. 6 and Calif. Stats 1951, c. 764, p. 2090, respectively).

The Supreme Court of the State of California denied without opinion the Petition for Writ of Review on March 10, 1965 and further denied, without opinion, a Petition for Rehearing on April 21, 1965.

Notices of Appeal to this Court were filed on July 19, 1965, with both the Supreme Court of the State of California and appellee California Commission. By order of Mr. Justice Harlan dated September 17, 1965,

the time for docketing this case on appeal was extended to October 16, 1965. Thus, the case involved a judgment by the highest court of a state where the validity of a state statute or authority exercised under the state was drawn in question as being repugnant to a law of the United States and a decision was made in favor of its validity. The Court, therefore, has jurisdiction under 28 U.S. Code Sec. 1257(2).

The following decisions sustain the jurisdiction of the Supreme Court to review the judgment in this case: *Atchison, T. & S. F. Ry. v. Public Util. Comm'n*, 346 U. S. 346, 348 (1953); *Live Oak Ass'n v. Railroad Commission*, 269 U.S. 354, 356 (1926); *Lake Erie & Western R. Co. v. Public Utilities Commission*, 249 U.S. 422, 424 (1919); *Sultan R & T Co. v. Department of Labor*, 277 U.S. 135, 136 (1928); *Lathrop v. Donohue*, 367 U.S. 820, 824-5 (1961).

Statutes Involved.

Section 1 (18), (19) and (20) of the Interstate Commerce Act as amended; Sections 202, 310, 761 and 762 of the Public Utilities Code of the State of California as amended, are set forth in Appendix F herein.

Questions Presented.

1. Whether jurisdiction over unauthorized abandonments of railroads engaged in interstate commerce, that is, failure to reconstruct a main line tunnel, is in the District Court of the United States (49 U.S.C. 1 (20)), and whether that jurisdiction is sole, affirmative and complete, to the exclusion of action on that subject by the California Commission.

2. Whether the disaster and catastrophe that appellant suffered during Christmas week of 1964, and subsequent to the California Commission's orders and decisions, wherein appellant suffered a flood damage net loss of over $10,000,000 when 100 miles of its 276 mile railroad was destroyed (and since rebuilt), and whether the railroad's substantial loss of business therefrom, that has created a huge net loss position, so that to require the rebuilding of its Puerto Suello Tunnel at a cost of $900,000, should or can be considered in connection with the issues of undue burden, confiscation and violation of due process under the Fourteenth Amendment to the Constitution of the United States, and whether the failure of the Supreme Court of the State of California to consider such matters was arbitrary, unreasonable and violative of the due process clause of the Fourteenth Amendment to the Constitution of the United States.

3. Whether the Public Utilities Commission of the State of California can order specific service, that is, the number of trains to be operated on a railroad, without allowing to be presented or considering evidence on the subject, and if in so ordering specific rail service the California Commission can disregard the statutory provision requiring a hearing by precluding evidence on the subject.

4. Whether the California Commission can issue an affirmative and supplemental order to an order of the Interstate Commerce Commission relying solely on the order of the Interstate Commerce Commission in an abandonment matter, and without any other evidence to support the California Commission's order, although the California statute under which the California Com-

mission was proceeding required a hearing, and further can the California Commission reject all evidence of changed conditions and ignore a pending proceeding before the Interstate Commerce Commission in reaching its decision that ordered reconstruction of a tunnel, without violating the due process clause of the Fourteenth Amendment to the Constitution of the United States and the provisions of 49 U.S.C. 1 (20).

5. Whether the Public Utilities Commission of the State of California should have stayed its hand until the proceedings to abandon in F. D. 23249 before the Interstate Commerce Commission were completed and action in that matter became final.

6. Whether the California's Commission's erroneous assumption that its order is supplemental to an Interstate Commerce Commission order resulted in such prejudicial error that the Public Utilities Commission of the State of California did not regularly pursue its authority.

Statement.

Appellant is a railroad of 276 main line mileage that operates in interstate commerce near the coastal area of Northern California, that is, from San Francisco to a point near the Oregon border. Its Puerto Suello tunnel is located just north of San Rafael, and about 10 miles north of its San Francisco Bay barge terminal. This tunnel was destroyed by fire on July 20, 1961, and will cost about $900,000 to rebuild. The area south of the tunnel in question is served by an existing barge operation across the San Francisco Bay, and thence by rail. The area north of the tunnel is served by existing rail connections with Southern Pacific Company. No rail

service has been conducted through the tunnel since its complete destruction by fire in 1961.

An application (FD 21725) to abandon the Puerto Suello tunnel and its approaches, was filed with the Interstate Commerce Commission on August 21, 1961. Hearings were held between January 25 and June 8, 1962. The interstate Commerce Commission on May 22, 1963, denied the application (320ICC19). On April 17, 1964, a three judge district court dismissed a complaint to set aside the order of the Commission (228 F. 2d 690, and this court on November 23, 1964, affirmed the judgment below (379 U.S. 132).

In the meantime, on August 10, 1964, a new application to abandon was filed with the Interstate Commerce Commission in F.D. 23249 that included the Puerto Suello tunnel and other areas of applicant's property, based on substantially changed conditions that had occurred since the 1962 hearing had been held in the previous abandonment application. This new application, (F.D. 23249), has been the subject of repeated motions to dismiss, but such motions have been finally denied (Appendix G) and hearings before the Interstate Commerce Commission are scheduled to commence on October 18, 1965, to consider whether, among other areas, the Puerto Suello Tunnel should be abandoned.

The Appellee, California Commission, on September 22, 1964, issued its order requiring the Puerto Suello tunnel to be rebuilt (Appendix C), and with knowledge of the pending proceeding to abandon before the Interstate Commerce Commission in F.D. 23249 (that had been filed on August 10, 1964.) The basis for the order of the California Public Utilities Commission was "to supplement the Interstate Commerce Commission order

(F.D. 21725) with an affirmative order" since the appellant was "under no affirmative order to reconstruct the tunnel" "and it is likely that respondent (appellant) will continue to delay in the absence of an affirmative order to reconstruct".

There was drawn in question before the appellee at the time of its hearing on the matter that action by it under the state statute and the authority exercised under the state statute was repugnant to the laws of the United States and specifically that the District Court of the United States had the sole, complete and affirmative jurisdiction in the matter in that exclusive jurisdiction to approve abandonments was vested in the Interstate Commerce Commission (49 U.S.C. 1 [18-20]) and the jurisdiction of the District Court (49 U.S.C. 1 (20)) was sole, affirmative and complete over unauthorized abandonments, including indefinite suspension of service.

The procedure before Appellee California Commission where it institutes an investigation on its own motion does not require responsive pleadings and none were filed. After appellee's order in this matter requiring reconstruction of the tunnel in question, and restoration of specific rail service, a Petition for Rehearing was filed with appellee that fully, carefully and specifically drew into question the validity of the statute and the authority exercised under the state because of repugnancy to the Constitution and laws of the United States (Cf. *Live Oak Water Users Assn. v. Railroad Commission* (269 U.S. 354, 356 [1926]), and specified at length and in detail the federal questions as well as the fact that since the order was based on no evidence, appellant had been deprived of a hearing, and that the actions of appellee and its orders violated the due process

clause of the Fourteenth Amendment to the Constitution of the United States.

Upon its Petition for Writ of Review to the Supreme Court of the State of California, appellant fully, carefully and specifically drew into question the same validity of the statute and the authority exercised under the statute because of the same repugnancy to the Constitution and the laws of the United States, specified at length and in detail the same federal questions as well as the fact that since the order was based on no evidence, that the appellant had been deprived of a hearing, and the action by appellee and its orders violated the due process clause of the Fourteenth Amendment to the Constitution of the United States, as well as directing the Supreme Court of the State of California attention to the fact the same issues that had been raised before appellee in appellant's Petition for Rehearing.

During Christmas week of 1964 a tremendous storm occurred wherein over 100 miles of appellant's 276 miles of main line was washed out and destroyed through the Eel River Canyon in the northern portions of the railroad's operations, with damages of over $10,000,000 net loss. This section of the railroad has been rebuilt, but the tremendous loss has seriously affected the economic soundness of the appellant. The Supreme Court of California refused to consider (under the existing statute) any facts or changed conditions that occurred since the submission matter to the Public Utilities Commission of California (which submission was long before the storm in question), which matters have a direct bearing on undue burden, confiscation and denial of due process under the Constitution of the United States.

The Questions Are Substantial.

The issues in this matter are of importance to the railroad industry and the administration of the Interstate Commerce Act. Section 1(18) of the Interstate Commerce Act provides for the authority of the Interstate Commerce Commission to pass upon railroad abandonments. Section 1(20) of the Interstate Commerce Act provides for the sole, complete and affirmative jurisdiction of the District Court where abandonment is effected without permission of the Interstate Commerce Commission. The order of the California Commission is in direct conflict with the provisions of the Interstate Commerce Act. Further, the California Commission has acted without evidence and authority to support its actions both in the matter of ordering the rebuilding of the tunnel and specifying the number of trains to be operated through the tunnel.

1. The matter of state regulatory commissions intruding themselves in areas where jurisdiction is in the District Court or Interstate Commerce Commission is of great concern to the railroads.

The basis of the California Commission's order in question was that:

> "it is likely that respondent (railroad) will continue to delay (reconstruction of the tunnel) in the absence of an affirmative order to reconstruct."

The California Commission based its authority to require the rebuilding of the tunnel in question upon the assumption it was issuing an order to supplement an Interstate Commerce Order in F.D. 21725 that denied the appellant the right to abandon the tunnel, that is, the purpose of the California Commission was to pre-

vent a continued *de facto* abandonment or indefinite suspension of service, by requiring the rebuilding of the tunnel.

The Interstate Commerce Act in sections 1(18)-(20), has placed matters involving abandonment of railroads within the exclusive jurisdiction of the Interstate Commerce Commission. (*Colorado v. United States*, 271 U.S. 153, 164-66 (1926), *Village of Mantorville v. Chicago Great Western RR.*, 8 F. Supp. 791, 794 (1934)). Further, section 1(20) of the Interstate Commerce Act provides suits for violation of the abandonment sections of the Interstate Commerce Act are to be brought in the district court.

Indefinite suspension of service, as here, is considered abandonment (*Meyers v. Jay Street Connecting Railroad*, 259 F. 2d 532, 535 (1958), and the District Court is the only forum having jurisdiction to prevent an illegal abandonment (*Meyers v. Famous Realty, Inc.*, 271 F. 2d 811, 816, n. 6 (1959).

As pointed out in *Piedmont & Nor. Ry. v. United States*, 280 U.S. 469, 477 (1930), the penalties are for violation of the statute:

> "The penalties provided in paragraph 20 are prescribed not for violation of an order of the Commission, but for violation of the provisions of the statute."

The jurisdiction of the district court over the subject matter has been held to be affirmative and complete. (*Texas & Pac. Ry. v. Gulf, etc., Ry.*, 270 U.S. 266, 273 (1926), *St. Louis S.W. Ry. v. Missouri Pac. R.R.*, 289 U.S. 76, 82 (1933)), and an injunction action in the District Court is sole remedy for illegal abandon-

ment (*Powell v. United States,* 300 U.S. 276, 287 (1937).

The California Commission was without jurisdiction to issue its order since the sole, affirmative and complete jurisdiction of the subject matter of preventing an abandonment had been placed in the District Court by the provisions of Section 1(20) of the Interstate Commerce Act, and of course the California Commission could have brought an injunction action in the District Court (49 U.S.C. 1(20)) but did not bring such an action, although such procedure was repeatedly called to the attention of the California Commission.

The procedure provided for in the District Court affords an opportunity "to secure an orderly hearing and proper determination of the matter." (*Western Pacific California R. Co. v. Southern Pacific Company,* 284 U.S. 47, 52 (1931); *St. Louis S.W. Ry. v. Missouri Pacific Railroad Co.,* 289 U.S. 76, 82 (1933).

2. During the period of December 18, 1964, to January 7, 1965, and particularly Christmas week, the storms which struck northern California in the Eel River Canyon were unprecedented.[2] Appellant Northwestern Pacific Railroad Company suffered over a $10,000,000 net loss when 100 miles of its 276 mile railroad were destroyed, and not including the railroad's substantial loss of business and revenue.

In a tremendous engineering undertaking, appellant rebuilt its railroad line in the Eel River area that was washed out and damaged by the floods, and the line was

[2]The highway system in the area suffered a tremendous loss. The California Legislature passed a measure that increased the state gasoline tax one cent to raise $58,000,000 to reconstruct the roads and highways in the area (Chapter 27, California Statutes of 1965, approved April 1, 1965).

opened for limited night time traffic in June 1965, while reconstruction to prepare for the normal winter floods continues in the daylight hours.

This more than $10,000,000 net loss suffered by a railroad raises serious financial problems. The railroad's substandard net income or return on investment is such that it will take many long years to recoup the $10,000,000 net flood loss[3] with no money available for additions, betterments and the vast demand on a railroad for new money for new modern facilities. To add to this loss, to require the expenditure of the large sum of money of $900,000 for the rebuilding of the Puerto Suello tunnel on top of the over $10,000,000 net loss suffered in the Christmas flood is an undue burden on the railroad (*Southern Ry. v. North Carolina,* 376 U.S. 93, 101 (1964)), and results in confiscation (*Northwestern Pac. R. R. v. United States,* 228 F. Supp. 690, 694 (1964)). Instead of the past small yearly sub-marginal net profit, the practical effect of the above disaster has created a huge net loss position with the resultant issues of undue burden and confiscation.

Northwestern Pacific Railroad Company's presentation to the Supreme Court of the State of California, in connection with the petition for writ of review filed October 29, 1964, was governed by section 1757 of the Public Utilities Code of California:

> "No new or additional evidence may be introduced in the Supreme Court, but the cause shall be heard on the record of the commission as certified to by it. . . ." (Calif. Stats. 1951, ch. 764, p. 2090.)

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[3]This statement is predicated upon business remaining as in the past, when, in fact, the shippers too have suffered great losses, and the amount of rail business may be at a lesser volume for years to come.

Appellant presented the matter of the $10,000,000 flood loss to the Supreme Court of the State of California at the first available time by way of a Petition for Rehearing but was met by the argument of appellee that the above cited section 1757 of the Public Utilities Code prohibited the Supreme Court of the State of California from considering such matters. The denial of the Supreme Court of the State of California was without opinion.

The situation is that the Supreme Court of the United States, contrary to the California Court, will consider matters that have occurred since the hearing below. (*Villa v. Van Schaick,* 299 U.S. 152, 155 (1936), *Missouri ex rel. Wabash Ry. v. Public Service Comm'n.,* 273 U.S. 126 (1927).

If the California Commission orders should be considered otherwise valid, it appears the matter should be remanded to the Public Utilities Commission for *consideration* so the matter of this tremendous flood loss can be considered. It is of serious concern to party litigants whether substantial changed factual conditions that have occurred since the hearing below can be ignored, or should properly be considered by the court above.

3. In this matter a state statute (Sec. 761 Calif. Public Utilities Code; Calif. Stats., 1951, Chap. 764, p. 2052) provides the California Commission can, after a hearing, determine and fix the service (number of trains) required. The California Commission in the present matter held a hearing, but the Presiding Commissioners ruled that all evidence regarding service or need for service was inadmissible and without the issues. and excluded all evidence on the subject of changed

conditions and lack of need for service. The California Commission then ordered, without any evidence to support the order, resumption of the same quantity and quality of service, that is six round trips a week and an occasional switch move, as existed before the tunnel fire.

The well-established general rule is that no defect, whether wilful or inadvertent, in the mechanics of the prior discontinuance of rail service provides grounds for a peremptory order requiring restoration of service. The California Commission should have afforded appellant the opportunity of presenting the facts (*St. Louis, etc. R. Co. v. Public Utilities Comm's.*, 279 U.S. 560, 563 (1929)). Where the public necessity and convenience do not require a particular service, there can be no obligation upon a public utility to furnish such service. This obligation is dependent upon the need; without the need, the obligation does not exist (*Pennsylvania-Reading Sea. Lines v. Board of Pub. Utilities*, 5 N.J. 114, 74 A. 2d 265, 271 (1950), cert. denied 340 U.S. 876.)

The only basis of support for such an arbitrary and unreasonable procedure would be that the California Commission was relying upon the order of the Interstate Commerce Commission, in FD 21725 to support such an order. However, FD 21725 was an application to abandon a portion of the railroad and such an application does not involve particular trains or services. (*Southern R. Co. v. North Carolina*, 376 U.S. 93, 101 (1964)). Thus the Interstate Commerce Commission in proceeding under Section 1(18) of the Interstate Commerce Act, could not make any valid finding as the particular number of trains needed to perform the freight service.

The matter is of particular importance to railroads, for if a state regulatory commission can specify the number of trains required to be operated, *ignore* provisions of state statutes providing for hearings on the subject, refuse to consider changed condition, and fix the number of trains without regard to public need, convenience and necessity, then the burden on interstate commerce becomes a very substantial matter as well as the deprivation of due process under the Fourteenth Amendment of the Constitution of the United States.

4. On August 10, 1965, appellant filed a new application (F.D. 23249) with the Interstate Commerce Commission seeking to abandon portions of appellant's rail line that included the Puerto Suello tunnel. This application was based upon the representation "substantially changed conditions exist presently as compared to the situation presented to the (Interstate Commerce) Commission in F.D. 21725, reported at 320 I.C.C. 19," such as the moving away of industries, the decrease of rail business, and the fact the high price of land precludes the future location of industry. Various protestants filed motions to dismiss which, without hearing, were first denied, then granted, and then set aside. The latest ruling of the Interstate Commerce Commission is set forth in Appendix G. The hearing in F.D. 23249, that includes the abandonment of the Puerto Suello tunnel is now set for hearing October 18, 1965. It is submitted the California Commission should be required at least to stay its hand until the Interstate Commerce Commission has passed on the matter, so that appellant will not have to spend $900,000 to rebuild the Puerto Suello tunnel only to find, if the Interstate

Commerce Commission so rules, that the Puerto Suello tunnel may be abandoned and the $900,000 need not be spent. It is of great concern to the railroad industry and the using public to determine whether state regulatory commissions can act without evidence and negate actions of the Interstate Commerce Commission.

5. If it should be considered the jurisdiction of the District Court is not sole affirmative and complete, the orders of the California Commission cannot be supported because they were based on no evidence other than an Interstate Commerce Commission decision in F.D. 21725. Decision No. 67889 (Appendix C) of the California Commission stated:

> "As in the Union Station case this Commission is now free to *supplement* the Interstate Commerce Commission with an *affirmative order,* issued pursuant to Section 762 of the Public Utilities Code, requiring respondent to rebuild the tunnel and to reinstate complete rail service." (63 Cal. P.U.C. 368, 371) (Emphasis added.)

Section 762 of the California Public Utilities Code provides for "a hearing." This, of course, was denied appellant when the California Commission refused to consider or hear evidence of substantially changed conditions or the new pending application No. 23249 before the Interstate Commerce Commission, or any evidence at all.

It was held in the Los Angeles Union Station cases referred to by the California Commission that although the order of the Interstate Commerce Commission was a condition precedent (*Railroad Comm'n v. Southern Pac. Co.,* 264 U.S. 331, 345, 346, 347 (1924)) to any action by the California Commission, that the Califor-

nia Commission had to base its order on evidence presented to that Commission and any order of the California Commission must be judged as to reasonableness from the evidence presented to the California Commission. It is the failure to take and consider evidence by the California Commission and the refusal of the California Commission to hear any evidence other than the introduction of the decision of the Interstate Commerce Commission that invalidated the California Commission's order. In other words, the California Commission had no evidence before it to support its order requiring the rebuilding of the tunnel. *The Atchison, T. & S.F. Ry. v. Railroad Comm'n,* 283 U.S. 380, 396 (1931).

6. Lastly, the California Commission erred in relying on any Interstate Commerce Commission decision, as previous orders of the Interstate Commerce Commission and past fact findings are not *res adjudicata,* and the new facts and changed conditions can always be shown. (*Youngstown Sheet & Tube Co. v. United States,* 7 F. Supp. 33, 36 (1934)). The Interstate Commerce Commission is not bound by any previous opinion of that Commission. (*Arizona Grocery Co. v. Atchison, T. & S.F. Ry.,* 284 U.S. 370 (1932); *Virginian Ry. v. United States,* 272 U.S. 658 (1926); and *United States v. American Sheet & Tin Plate Co.,* 301 U.S. 402, 408 (1937)).

The Record.

In summary, a portion of the record is lodged with and in the custody of the Supreme Court of the State of California and a portion of the record is lodged with and in the custody of the Public Utilities Commission of the State of California. Notices of Appeal were duly filed with both the Public Utilities Com-

mission of the State of California, and the Supreme Court of the State of California. The Public Utilities Commission of the State of California will not certify for transmission of the Clerk of this Court that portion of the record in the custody and possession of the California Public Utilities Commission. On September 13, 1965, a Petition for a Writ of Mandate was filed with the Supreme Court of the State of California to require the Public Utilities Commission of the State of California to certify for transmission to this Court copies of that portion of the record designated in the Notice of the Appeal that is in the custody of and possessed by the Public Utilities Commission of the State of California. On September 15, 1965, the Petition for a Writ of Mandate was denied (Exhibit A of Appendix H). On September 23, 1965, a petition for Rehearing was filed in the Supreme Court of the State of California, a copy of the Petition for Rehearing is attached as Appendix H. No decision on the Petition for Rehearing has been reached. In the event the Supreme Court of the State of California denies the Petition for Rehearing or does not act on the matter within a reasonable length of time, appellant requests that appellee California Commission be required to certify for transmission to this Court the portions of the record in its custody specified in the Notice of Appeal and as required by the Revised Rules of the Supreme Court of the United States (*Re Summers,* 325 U.S. 561, 563 (1945)).

Appellant Northwestern Pacific Railroad Company filed its Petition for Writ of Review, S.F. No. 21861, in the Supreme Court of the State of California seeking a review of Public Utilities Commission's Case No. 7907 (Appendix C), as provided for in section 1756 of the Public Utilities Code of California (Calif. Stat.

1963, ch. 461, p. 1310, §6). This California statute provides that the Supreme Court of the State of California shall direct the Public Utilities Commission to certify and bring up its records as follows:

> "Within 30 days after the application for a rehearing is denied, or, if the application is granted, then within 30 days after the decision on rehearing, the applicant may apply to the Supreme Court of this State for a writ of certiorari or review for the purpose of having the lawfulness of the original order or decision or of the order or decision on rehearing inquired into and determined. The writ shall be made returnable at a time and place then or thereafter specified by court order and shall direct the commission to certify its record in the case to the court within the time therein specified."

Section 1757 of the Public Utilities Code (Calif. Stat. 1951, ch. 764, p. 2090) provides as follows:

> "No new or additional evidence may be introduced in the Supreme Court, but the cause shall be heard on the record of the commission as certified to by it. . . ."

Section 1706 of the California Public Utilities Code (Calif. Stat. 1951, ch. 764, p. 2080) provides in part as follows:

> ". . . In case of an action to review any order or decision of the commission, a transcript of such testimony, together with all exhibits or copies thereof introduced, and of the pleadings, record, and proceedings in the cause, shall constitute the record of the commission. . . ."

The Petition for Writ of Review of this appellant, on pages 7 and 8 thereof, prayed as follows:

> "WHEREFORE, petitioner (appellant) prays that this Court issue a writ of review requiring respondent (appellee) to certify to this (Supreme) Court (of the State of California) its complete record in Case No. 7907, including all pleadings, orders, memoranda, reporter's transcripts, letters and exhibits forming a part of that record; that this Court review the record of said proceedings and thereupon annul and set aside Decisions Nos. 67889 and 68509, . . ."

Appellant's Petition for Writ of Review, S.F. No. 21861, and the accompanying papers addressed to the Supreme Court of the State of California are replete with references to, and quotes from, the transcript and exhibits from the Public Utilities Commission's proceedings.

The Supreme Court of the State of California, by its order denying the Petition for Writ of Review in S.F. No. 21861 dated March 10, 1965, denied a Writ of Review. The Supreme Court of the State of California did not direct the California Commission to certify and bring up the record that had been before the Public Utilities Commission.

This appeal is taken pursuant to section 1257(2) of the *U.S. Judicial Code,* (28 U.S.C. 1257(2)), wherein there is drawn in question the validity of the order of the California Commission, its repugnancy to federal law, and violation of the United States Constitutional provisions. Thus, the evidence and record before the Public Utilities Commission is essential to determine the validity of the orders of the California Commission.

On the 19th day of July, 1965, and within the time allowed by law, appellant duly served and filed identical Notices of Appeal from said orders of the Supreme Court of the State of California; that a certified copy of the Notice of Appeal that was filed with the Supreme Court of the State of California is docketed herewith; that also a Notice of Appeal was filed with the California Commission; that portions of the record appellant desires the Supreme Court of the United States to review are in the custody and possessed by the California Commission.

That heretofore appellant tendered to the California Commission true copies of all the matters designated in the Notice of Appeal to the Supreme Court of the United States filed with the California Commission that are in the custody of the California Commission and offered to pay all charges in connection with certification for transmission to the Supreme Court of the United States; that as early as June 28, 1965, the appellant had taken up with the appellee California Commission the matter of certifying the portion of the record in its custody to the Supreme Court of the United States; that thereafter there were discussions concerning copies of the record to be certified; that it was not until Friday, September 10, 1965, the California Commission, for the first time, advised appellant Northwestern Pacific Railroad Company that the appellee California Commission would do nothing in the matter, and that the appellee California Commission takes the position that it is not obliged to certify a portion of the record made before the appellee California Commission in this matter which was not brought up to the Supreme Court of the State of California and therefore declines to certify that por-

tion of the record in the custody of the appellee California Commission.

On Monday, September 13, 1965, appellant Northwestern Pacific Railroad Company filed in the Supreme Court of the State of California a Petition for a Writ of Mandate, S.F. No. 22132, pursuant to procedure provided for in the State of California (§ 1759 of the California Pub. Util. Code; Calif. Stat. 1951, ch. 764, p. 2091, § 1759), requesting that the Supreme Court of the State of California direct the appellee California Commission to certify copies of the designated portions of the record (set forth in the Notice of Appeal) in its custody for transmission to the Supreme Court of the United States. As stated previously, this Petition for a Writ of Mandate was denied on September 13, 1965, and a Petition for Rehearing (Appendix H) was filed on September 23, 1965, with the Supreme Court of the State of California, and decision is awaited.

If the Supreme Court of the State of California denies the Petition for Rehearing or declines to issue a Writ of Mandate, or does not act on the matter within a reasonable length of time, it is respectfully requested that this Court require and direct the appellee to certify for transmission to this Court the portions of the record in its custody specified in the Notice of Appeal and as required by the Revised Rules of the Supreme Court of the United States (*Re Summers,* 325 U.S. 561, 563 (1945)). A detailed argument in support of said request is set forth in appellant's Petition for Rehearing denying a Petition for a Writ of Mandate attached hereto as Appendix H.

Conclusion.

The questions presented by this appeal are substantial and of broad public importance. Probable jurisdiction should therefore be noted.

Respectfully submitted,

THORMUND A. MILLER,
JEREMIAH C. WATERMAN,
RANDOLPH KARR,
By RANDOLPH KARR,
Attorneys for Appellant.

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APPENDIX A.

Order Denying Writ of Review.

In the Supreme Court of the State of California in Bank.

Northwestern Pacific Railroad Company v. Public Utilities Commission. S.F. No. 21861.

Petition for writ of review Denied.

Peters, J., is of the opinion that the petition should be granted.

Traynor
Chief Justice

APPENDIX B.

Order Denying Rehearing.

In the Supreme Court of the State of California in Bank.

Northwestern Pacific Railroad Company v. Public Utilities Commission. S.F. No. 21861.

..... petition for rehearing Denied.

Peters, J. is of the opinion that the petition should be granted.

Traynor
Chief Justice

APPENDIX C.

Decision No. 67889, Case No. 7907
(September 22, 1964).

Orders *Northwestern Pacific Railroad Company* to reopen Puerto Suello Tunnel, San Rafael, damaged by fire.

[1] Commission—Jurisdiction. While the Interstate Commerce Commission may have exclusive jurisdiction over abandonment of a railroad line or a portion thereof under Section 1(18) (20) of the Interstate Commerce Act, under section 762 of the Public Utilities Code the California Commission may require a public utility to repair existing plant and facilities for the convenience of the public and to secure adequate service. See *AT&SF Ry. Co. v. Railroad Com. of Cal.*, 75 L.Ed. 1128, 283, U.S. 380 (1931).

Randolph Karr, for respondent.

Graham James & Rolph, by *Boris H. Lakusta* and E. Myron Bull, Jr., for Cities of San Rafael, San Anselmo, Fairfax, and Sausalito; County of Marin, Marin Industrial Development Foundation, Camgros Gravel & Fuel Co., Inc., Chris Craft Sales of San Rafael, Colonial Wax Products Corporation of California, Golden Gate Distributing Co., Henry Hess Co., California Newspapers, Inc. (San Rafael Independent Journal), McPhail Fuel Co., PBM, Inc., Rice Supply, Inc., A. G. Schoonmaker Co., Service Lumber Co., Shamrock Materials, Inc.; *George W. Ballard* and *James L. Evans*, for Brotherhood of Railroad Trainmen AFL-CIO, Brotherhood of Locomotive Firemen & Enginemen AFL-CIO, and *Leonard M. Wickliffe*,

for Railroad Brotherhoods' California Legislative Association, interested parties.

Hector Anninos, for the Commission staff.

OPINION

By its order dated May 19, 1964, the Commission instituted an investigation into the operations and service of Northwestern Pacific Railroad Company for the following purposes:

> "1. To determine what plans or intent, if any respondent has in connection with reconstruction of the Puerto Suello tunnel and restoration of service as it existed prior to the fire.
>
> 2. To determine whether respondent should be ordered to reconstruct the Puerto Suello tunnel and restore the prior existing service.
>
> 3. To determined whether any other order or orders that may be appropriate should be entered in the lawful exercise of the Commission's jurisdiction."

A public hearing was held before Commissioner Bennett and Examiner Daly on June 8, 1964, at San Rafael. The matter was submitted upon the receipt of concurrent briefs since filed and considered.

Respondent is presently engaged as a railroad corporation common carrier and public utility as those terms are defined in the Constitution of the State of California and in the Public Utilities Code. It operates generally between Arcata, on the north, and the San Francisco Bay Area, on the south. Connections are made with respondent's parent company, Southern Pacific Company, by virtue of a branch line between

Ignacio and Schellville. Respondent also connects with The Atchison, Topeka & Santa Fe Railway Company at Tiburon. The connection is via a car ferry operated by Santa Fe between Tiburon and Richmond.

The record indicates that on July 20, 1961, respondent's Tunnel No. 4 (Puerto Suello Tunnel), which is located on the northern city limits of San Rafael, was damaged by fire. As the result of cave-ins the tunnel was completely closed thereby cutting respondent's main line between San Rafael and Tiburon. In August of the same year respondent filed an application (Finance Docket No. 21725) with the Interstate Commerce Commission for a certificate of public convenience and necessity under Section 1(18) of the Interstate Commerce Act to abandon that portion of its line south of the tunnel. Following ten days of hearing in 1962 and consideration of the extensive briefs, the hearing examiner recommended denial of the certificate (Exhibit No. 1). After the filing of exceptions to the examiner's report and oral argument before Division 3 of the Interstate Commerce Commission, the Commission on June 5, 1963 adopted the recommendation of the hearing examiner. Shortly thereafter the Interstate Commerce Commission declined to make a finding of general transportation importance, a prerequisite to the filing of a petition for rehearing by the entire Commission. Having exhausted its administrative remedies, respondent appealed to a three-judge Federal District Court in San Francisco. The matter was again extensively briefed, and oral argument was held in San Francisco on April 10, 1964. On April 17, 1964, the court dismissed the appeal and affirmed the order of Division 3 of the Interstate Commerce Commission. On

June 15, 1964, respondent filed its notice of appeal to the Supreme Court of the United States.

Respondent contends that the applicable provisions of the Interstate Commerce Act preclude any action by this Commission. It further contends that if the Commission requires the tunnel to be rebuilt, then, as a practical matter, respondent will have been deprived of its right of appeal in the abandonment case.

This Commission will concede that the Interstate Commerce Commission has exclusive jurisdiction over abandonment of a railroad line or a portion thereof under Section 1(18) (20) of the Interstate Commerce Commission. However, this Commission has jurisdiction under Section 762 of the Public Utilities Code to require a public utility to repair existing plant and facilities for the convenience of the public and to secure adequate service.[1]

---

[1]Section 762 reads as follows:

"Whenever the commission, after a hearing, finds that additions, extensions, repairs, or improvements to, or changes in, the existing plant, equipment, apparatus, facilities, or other physical property of any public utility or of any two or more public utilities ought reasonably to be made, or that new structures should be erected, to promote the security or convenience of its employees or the public, or in any other way to secure adequate service or facilities, the commission shall make and serve an order directing that such additions, extensions, repairs, improvements, or changes be made or such structures be erected in the manner and within the time specified in the order. If the commission orders the erection of a new structure, it may also fix the site thereof. If the order requires joint action by two or more public utilities, the commission shall so notify them and shall fix a reasonable time within which they may agree upon the portion or division of the cost which each shall bear. If at the expiration of such time the public utilities fail to file with the commission a statement that an agreement has been made for a division or apportionment of the cost; the commission may, after further hearing, make an order fixing the proportion of such cost to be borne by each public utility and the manner in which payment shall be made or secured." (Former Sec. 36)

The United States Supreme Court in *Atchison, Topeka & Santa Fe Railway Company v. Railroad Commission of California*, 75 L. Ed. 1128, 283 U.S. 380 (1963), has made it clear that the authority of this Commission to require a railroad to make necessary repairs has not been abrogated by the Interstate Commerce Act. In that case this Commission ordered certain railroads to construct a union station in Los Angeles. Prior to that time this Commission and the City of Los Angeles had petitioned the Interstate Commerce Commission requesting that the Interstate Commerce Commission order the construction of the union station and for the issuance of certificates of public convenience and necessity permitting the extension and abandonment of certain lines incidental to the construction of the union terminal. The Interstate Commerce Commission issued the certificates, but refused to order the construction of the union station. The position of the Interstate Commerce Commission was sustained on appeal *Interstate Commerce Commission v. United States of America*, 280 U.S. 52, 74 L. Ed. 163 (1929). The issue on appeal was whether this Commission had the authority to order the construction of the union station. In affirming such power in this Commission the Supreme Court stated the following:

> "The considerations which led the court to the conclusion that the power to compel the construction of such terminals had been withheld from the Federal Commission also make it clear that *the authority which resided in the state had not been taken away except to the extent that the approval of the Federal Commission was required.* The principle thus applicable has been frequently stated. It

is that the *Congress may circumscribe its regulation and occupy a limited field, and that the intention to supersede the exercise by the state of its authority as to matters not covered by the Federal legislation is not to be implied unless the act of Congress fairly interpreted is in conflict with the law of the state.* [Citing cases.] We find no such conflict in this case, as the approval of the Interstate Commerce Commission has been obtained, and its certificate of public convenience and necessity has been issued, in relation to the rearrangement, extensions and abandonment of tracks, and the use of the terminal facilities, involved in the proposed plan, and nothing further was required by the Interstate Commerce Act." (Emphasis added.)

In the instant proceeding the Interstate Commerce Commission denied the certificate to abandon, and said order was affirmed by the District Court. The denial was based upon the grounds that restoration of the tunnel and of the service offered prior to the fire would not constitute an undue burden upon interstate commerce, and that public convenience and necessity did not permit the abandonment. As in the Union Station case this Commission is now free to supplement the Interstate Commerce Commission order with an affirmative order, issued pursuant to Section 762 of the Public Code, requiring respondent to rebuild the tunnel and to reinstate complete rail service.

At the present time respondent is under no affirmative order to reconstruct the tunnel. If the United States Supreme Court affirms the District Court and the Interstate Commerce Commission it is likely that respond-

ent will continue to delay in the absence of an affirmative order to reconstruct.

In response to respondent's argument that an order to reconstruct would have the effect of denying respondent its right of appeal, it may be said that if its notice of appeal to the United States Supreme Court is predicated upon merit respondent may request a stay of this Commission's order pending determination by the United States Supreme Court.

After consideration the Commission finds that:

1. Respondent is a railroad corporation, common carrier and public utility carrier subject to the jurisdiction of this Commission.

2. Respondent operates between Arcata and the San Francisco Bay Area.

3. On July 20, 1961, respondent's Tunnel No. 4 (Puerto Suello Tunnel) was damaged by fire, resulting in cave-ins which closed the tunnel and thus blocked respondent's main line at a point just north of the City of San Rafael.

4. Following extensive hearings, briefs and oral argument the Interstate Commerce Commission, Division 3, on May 22, 1963, denied respondent's application for a certificate to abandon rail service south of San Rafael. Said Commission subsequently failed to find that an issue of general transportation importance was involved as requested by respondent.

5. On April 17, 1964, following briefs and arguments a three-judge court for the Federal District Court for the Northern District of California affirmed the order of the Interstate Commerce Commission, Division 3.

6. On June 15, 1964, respondent filed its notice of appeal to the Supreme Court of the United States.

Conclusion

The Commission concludes that pursuant to Section 762 of the Public Utilities Code respondent should be required to commence restoration of Tunnel No. 4 (Puerto Suello Tunnel) within thirty days after the effective date of this order and should complete said restoration as soon as possible, and in no event in a period longer than 150 days, and upon completion should restore the same quantity and quality of rail service as that provided prior to the destruction of the tunnel.

ORDER

IT IS ORDERED that:

1. Within thirty days after the effective date hereof Northwestern Pacific Railroad Company shall commence reconstruction of Tunnel No. 4 (Puerto Suello Tunnel) and shall complete said reconstruction with all dispatch, and in no event longer than one hundred fifty days from the date of commencement.

2. Within five days after commencement respondent shall file with this Commission a report setting forth in detail its final plans for reconstruction of Tunnel 4 and the date when actual physical work of restoration first began.

3. Within five days after reconstruction of Tunnel No. 4 has been completed respondent shall restore the same quantity and quality of rail service as that provided prior to the destruction of said Tunnel No. 4, and within said period of time shall file with this Commission a report indicating the date of completion, the

date that complete rail service is restored and the nature of the service provided.

The Secretary of the Commission is directed to cause personal service of this order to be made upon respondent. The effective date of this order shall be twenty days after the completion of such service.

Dated at San Francisco, California, this 22nd day of September, 1964.

Mitchell, McKeage, Bennett,
Commissioners

I concur in the findings and order.
/s/ Frederick B. Holoboff

I concur in the findings and order.
/s/ George G. Grover

APPENDIX D.

Decision No. 68059, Case No. 7907
(October 13, 1964).

ORDER AMENDING DECISION AND DENYING REHEARING

Northwestern Pacific Railroad Company having filed a petition for rehearing and request for oral argument before the full Commission and stay of Decision No. 67889, and the Commission having considered said petition and request and each and every allegation therein,

IT IS ORDERED:

1. Decision No. 67889 is amended by adding the following finding on sheet 7 of the opinion therein;

> "7. That restoration of respondent's Tunnel No. 4 is necessary for the convenience of the public and to secure adequate service."

2. The petition for rehearing and stay of Decision No. 67889, as amended herein, is denied.

Dated at San Francisco, California, this 13th day of October, 1964.

Holoboff, *President*
Mitchell, McKeage, *Commissioners*

Commissioner George G. Grover, being necessarily absent, did not participate in the disposition of this proceeding.

Commissioner William M. Bennett, being necessarily absent, did not participate in the disposition of this proceeding.

APPENDIX E.

Supplemental Order.

Before the Public Utilities Commission of the State of California. Decision No. 68987.

Investigation on the Commission's own motion into the operations and services of Northwestern Pacific Railroad Company in connection with the Puerto Suello Tunnel, San Rafael, California. Case No. 7907 (Filed May 19, 1964).

Petition for writ of review of Decision No. 67889 having been filed with the Supreme Court of California (Northwestern Pacifil Railroad Co. v. P.U.C., S.F. No. 21861) and a stay of this Commission's order therein having been issued by said Court pending final determination of the petition for writ of review, and it appearing further that the petition for writ of review was denied by the Court on March 10, 1965 and that petition for rehearing was denied on April 21, 1965, and that said stay is now vacated,

It Is Ordered that the effective date of Decision No. 67889 is made the date hereof.

Dated at San Francisco, California, this 4th day of May, 1965.

Frederick B. Holoboff
President

Peter E. Mitchell
George G. Grover
William M. Bennett
A. W. Gatov
Commissioners

APPENDIX F.

Interstate Commerce Act Section 1 (18) to (21), Inclusive.

§ 1, par. (18). *Extension or abandonment of lines; certificate required; contracts for joint use of spurs, switches, etc.* No carrier by railroad subject to this chapter shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this chapter over or by means of such additional or extended line of railroad, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line of railroad, and no carrier by railroad subject to this chapter shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment. Nothing in this paragraph or in section 5 of this title shall be considered to prohibit the making of contracts between carriers by railroad subject to this chapter, without the approval of the Commission, for the joint ownership or joint use of spur, industrial, team, switching, or side tracks. Feb. 4, 1887, c. 104, Pt. I, § 1, 24 Stat. 379; May 29, 1917, c. 23, 40 Stat. 101; Feb. 28, 1920, c. 91, § 402, 41 Stat. 477; Aug. 9, 1935, c. 498, § 1, 49 Stat. 543; Sept. 18, 1940, c. 722, Title I, § 4(c), 54 Stat. 901.

§ 1, par. (19). *Application for certificate of Commission; notice and hearing.* The application for and issuance of any such certificate shall be under such rules and regulations as to hearings and other matters as the Commission may from time to time prescribe, and the provisions of this chapter shall apply to all such proceedings. Upon receipt of any application for such certificate the Commission shall cause notice thereof to be given to and a copy filed with the governor of each State in which such additional or extended line of railroad is proposed to be constructed or operated, or all or any portion of a line of railroad, or the operation thereof, is proposed to be abandoned, with the right to be heard as hereinafter provided with respect to the hearing of complaints or the issuance of securities; and said notice shall also be published for three consecutive weeks in some newspaper of general circulation in each county in or through which said line of railroad is construced or operates. Feb. 4, 1887, c. 104, Pt. I, § 1, 24 Stat. 379; May 29, 1917, c. 23, 40 Stat. 101; Feb. 28, 1920, c. 91, § 402, 41 Stat. 478; Aug. 9, 1935, c. 498, § 1, 49 Stat. 543.

§ 1, par. (20). *Issuance of certificate by Commission; unlawful extension or abandonment of lines.* The Commission shall have power to issue such certificate as prayed for, or to refuse to issue it, or to issue it for a portion or portions of a line of railroad, or extension thereof, described in the application, or for the partial exercise only of such right or privilege, and may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require. From and after issuance of such certificate, and not before, the carrier by railroad may,

without securing approval other than such certificate comply with the terms and conditions contained in or attached to the issuance of such certificate and proceed with the construction, operation, or abandonment covered thereby. Any construction, operation, or abandonment contrary to the provisions of this paragraph or of paragraph (18) or (19) of this section may be enjoined by any court of competent jurisdiction at the suit of the United States, the Commission, any commission or regulating body of the State or States affected, or any party in interest; and any carrier which, or any director, officer, receiver, operating trustee, lessee, agent, or person, acting for or employed by such carrier, who knowingly authorizes, consents to, or permits any violation of the provisions of this paragraph or of paragraph (18) of this section, shall upon conviction thereof be punished by a fine of not more than $5,000 or by imprisonment for not more than three years, or both. Feb. 4, 1887, c. 104, Pt. I, § 1, 24 Stat. 379; May 29, 1917, c. 23, 40 Stat. 101; Feb. 28, 1920, c. 91, § 402, 41 Stat. 478.

Public Utilities Code of the State of California.

§ 202. *Interstate and foreign commerce*

Neither this part nor any provision thereof, except when specifically so stated, shall apply to commerce with foreign nations or to interstate commerce, except insofar as such application is permitted under the Constitution and laws of the United States; but with reference to passenger stage corporations operating in in-

terstate commerce between any point within this State and any point in any other state or in any foreign nation, the commission may prescribe such reasonable, uniform and nondiscriminatory rules in the interest and aid of public health, security, * * * convenience, and general welfare as, in its opinion, are required by public convenience and necessity. (As amended Stats. 1963, c. 2148, p. 4481, § 1.)

§ 310. *Quorum; investigation, inquiry, and hearing by designated commissioner*

A majority of the commissioners shall constitute a quorum for the transaction of any business, for the performance of any duty, or for the exercise of any power of the commission. Any investigation, inquiry, or hearing which the commission has power to undertake or to hold may be undertaken or held by or before any commissioner or commissioners designated for the purpose by the commission. The evidence in any investigation, inquiry, or hearing may be taken by the commissioner or commissioners to whom such investigation, inquiry, or hearing has been assigned or, in his or their behalf, by any facilities, service, or methods to be observed, furnished, constructed, enforced, or employed. The commission shall prescribe rules for the performance of any service or the furnishing of any commodity of the character furnished or supplied by any public utility, and, on proper demand and tender of rates, such public utility shall furnish such commodity or render such service within the time and upon the condi-

tions provided in such rules. (Stats. 1951, c. 764, p. 2052, § 761.)

§ 761. *Commission order or rule; rules for performance of service or furnishing of commodity*

Whenever the commission, after a hearing, finds that the rules, practices, equipment, appliances, facilities, or service of any public utility, or the methods of manufacture, distribution, transmission, storage, or supply employed by it, are unjust, unreasonable, unsafe, improper, inadequate, or insufficient, the commission shall determine and, by order or rule, fix the rules, practices, equipment, appliances, facilities, service, or methods to be observed, furnished, constructed, enforced, or employed. The commission shall prescribe rules for the performance of any service or the furnishing of any commodity of the character furnished or supplied by any public utility, and, on proper demand and tender of rates, such public utility shall furnish such commodity or render such service within the time and upon the conditions provided in such rules. (Stats. 1951, c. 764, p. 2052, § 761.)

§ 762. *Order for addition, repair, or change in physical property; site of new structure; order requiring joint action; division of cost*

Whenever the commission, after a hearing, finds that additions, extensions, repairs, or improvements to, or changes in, the existing plant, equipment, apparatus, facilities, or other physical property of any public utility or of any two or more public utilities ought reasonably to be made, or that new structures should be erected, to promote the security or convenience of its employees or the public, or in any other way to secure adequate

service or facilities, the commission shall make and serve an order directing that such additions, extensions, repairs, improvements, or changes be made or such structures be erected in the manner and within the time specified in the order. If the commission orders the erection of a new structure, it may also fix the site thereof. If the order requires joint action by two or more public utilities, the commission shall so notify them and shall fix a reasonable time within which they may agree upon the portion or division of the cost which each shall bear. If at the expiration of such time the public utilities fail to file with the commission a statement that an agreement has been made for a division or apportionment of the cost, the commission may, after further hearing, make an order fixing the proportion of such cost to be borne by each public utility and the manner in which payment shall be made or secured. (Stats. 1951, c. 764, p. 2052, § 762.)

APPENDIX G.

Order.

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 3, acting as an Appellate Division, held at its office in Washington, D.C., on the 29th day of July, A.D. 1965.

Finance Docket No. 23249

NORTHWESTERN PACIFIC RAILROAD COMPANY ABANDONMENT IN MARIN AND SAN FRANCISCO COUNTIES, CALIF.

Upon consideration of the matters and things involved in the above-entitled proceeding, and of the following:

(1) Petition of applicant, filed April 28, 1965, for reconsideration and rehearing of the order of March 24, 1965, granting motions for dismissal of the application;

(2) Petitions by the City of Larkspur, the Town of Corte Madera, and the Corte Madera Chamber of Commerce for leave to intervene and file tendered petitions for reconsideration and rehearing, in support of the application for authority to abandon the Sausalito Branch;

(3) Petitions by the City of Tiburon, the Tiburon Chamber of Commerce, and the Tiburon Property Owners Association, Inc., for leave to intervene and file tendered petitions for reconsideration and rehearing, in support of the application for authority to abandon the portion of applicant's main line between Meadowsweet and Tiburon;

(4) Petition by applicant, filed June 2, 1965, as supplemented June 14, 1965, to terminate a controversy between applicant and the California Public Utilities Commission, concerning the latter's order of September 22, 1964, in case No. 7907, as amended, and the significance of evidence of later storm damage on applicant's financial condition and the requirement for reconstruction of the Puerto Suello Tunnel; and

(5) Replies by The Atchison, Topeka and Santa Fe Railway Company, protestant, filed May 10 and 17 and June 17, 1965, to the above-described petitions; California Public Utilities Commission, filed May 11 and 18, 1965, to applicant's first-described petition and petitions by interveners; and protestants, the City of San Rafael et al., filed May 12 and 17, 1965, to said petitions;

and good cause therefor appearing:

It is ordered, That the City of Larkspur, the Town of Corte Madera, the Corte Madera Chamber of Commerce, the City of Tiburon, the Tiburon Chamber of Commerce, and the Tiburon Property Owners Association, Inc., be, and they are hereby, permitted to intervene in support of the application and be treated as parties herein, with the right to file the tendered petitions for reconsideration and rehearing, and to have notice of and to participate in future proceedings, provided that such permission shall not be construed as allowing interveners unduly to broaden the issues.

It is further ordered, That the petitions of applicant and interveners for reconsideration and rehearing be, and they are hereby granted;

It is further ordered, That upon reconsideration, the order of March 24, 1965, dismissing the application be, and it is hereby, vacated and set aside;

It is further ordered, That the proceeding be, and it is hereby, assigned for hearing at a time and place to be hereafter designated; and

It is further ordered, That applicant's petition, as supplemented, to terminate the controversy with the California Public Utilities Commission be, and it is hereby, dismissed as moot.

By the Commission, Division 3, acting as an Appellate Division.

H. Neil Garson,
Secretary.

(Seal)

APPENDIX H.

Petitioner's Petition for Rehearing.

In the Supreme Court of the State of California.

Northwestern Pacific Railroad Company, a corporation, Petitioner, vs. Public Utilities Commission of the State of California, Respondent. S.F. No. 22132.

Petitioner, Northwestern Pacific Railroad Company, in the above matter, and in which a decision was rendered by this court on September 15, 1965, a copy of which is attached hereto as Exhibit A, respectfully requests a rehearing, and that said decision be set aside and a Petition for Writ of Mandate be granted, on the following grounds:

GROUNDS OF PETITION

The decision and order in this matter are directly contrary to the rules of law and decisions of the Supreme Court of the United States, and the holding of this court is not only without authority in law, but directly contrary thereto.

ARGUMENT

I

FOREWORD

What is involved is what portions of the record should be placed before the Supreme Court of the United States in an appeal now pending in that court. Under the limited procedure for review of Public Utilities Commission in California (Sec. 1756) the record of the Public Utilities Commission is not brought up to the Supreme Court of the State of California unless a Petition for Writ of Review is granted. Here the Petition for Writ of Re-